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Supreme Court of the United States

OCTOBER TERM, 1962

No. 356

IN RE: ESTATE OF RAYMOND B. TRIPP, DECEASED

WILLIAM A. TRIPP, PETITIONER,

versus

IRENE F. TRIPP, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE SUPREME COURT OF SOUTH CAROLINA

Irene F. Tripp, in opposition to petitioner's request for a Writ of *Certiorari* to review the judgment of the Supreme Court of South Carolina entered June 1, 1962, submits the following data:

QUESTIONS PRESENTED

1. A proceeding to probate a will being "*in rem*," does Ohio Probate Code, which does not require notice to de-

cedent's non-resident heirs, deprive those expectant heirs of property rights without due process of law?

2. Was not the State of South Carolina free to recognize the Ohio probate decree and accord it conclusive effect?

3. In view of Ohio statute permitting contest of the Probate Court's jurisdiction upon a will being presented for probate, is a party interested against the will denied due process of law by having to admit the original probate jurisdiction on contesting the validity of the will in the higher trial court?

4. Does petitioner, who had full knowledge of the probate proceedings, have standing to challenge the constitutionality of Ohio's probate procedures with respect to written notice?

ADDITIONAL STATUTES INVOLVED

In addition to the constitutional provisions and statutes to which petitioner refers in his brief, the following sections of the Revised Code of Ohio, or pertinent portions thereof, appear below:

2101.12. What books shall be kept by probate court:

The following books shall be kept by the Probate Court:

(A) • • •

(B) An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties therein, a minute of the time of filing each paper, and a brief note of each order or proceeding relating to the estate with reference to the journal or record in which the order or proceeding is found;

(C) • • •

(D) A civil docket, in which shall be noted the names of parties to actions and proceedings, a minute of the time of the commencement of such actions and

proceedings and of the filing of the papers relating thereto, a brief note of the orders made therein and the time of entering them;

(E) A journal, in which shall be kept minutes of official business transacted in the probate court, or by the probate judge, in civil actions and proceedings;

(F) A record of wills, in which the wills proved in such court shall be recorded with a certificate of the probate thereof, and wills proved elsewhere with the certificate of probate, authenticated copies of which have been admitted to record by the court;

(G) * * *
(H) * * *
(I) * * *
(J) * * *
(K) * * *
(L) * * *
(M) * * *
(N) * * *

To each record required by this section, an index shall be attached and securely bound in the volume. Each index shall be kept current with the entries therein and shall refer to such entries alphabetically by the names of the persons as they were originally entered, indexing the page of the book where the entry is made. On the order of the judge, blankbooks for such records and indexes shall be furnished by the board of county commissioners at the expense of the county.

2101.14. **Care and preservation of papers; time stamp.**

All pleadings, accounts, vouchers, and other papers in each estate, trust, assignment, guardianship, or other proceeding, *ex parte* or adversary, which are filed in the probate court shall be kept together, and upon the final termination or settlement of such case, cause, or proceeding shall be preserved for future reference and examination. Such papers shall be properly jacketed, and otherwise tied, fastened, or held together, numbered, lettered, or otherwise marked in such manner that they may be readily found by reference to

proper memoranda upon the docket, record, or index entries thereof, which memoranda shall be made by the probate judge. Certificates of marriage, reports of births and deaths, and similar papers not part of a case or proceeding, shall be arranged and preserved separately in the order of their dates or in which they were filed. As used in this section "case" or "cause" includes all proceedings in the settlement of any estate, guardianship, or assignment, except as provided in section 2101.141 of the Revised Code.

The probate court shall provide a time stamp and shall stamp on all papers filed in said court the day, month, and year of the filing thereof.

2107.61. **Will ineffectual.**

Unless it has been admitted to probate or record, as provided in sections 2107.01 to 2107.62, inclusive, and 2129.05 to 2129.07, inclusive, of the Revised Code, no will is effectual to pass real or personal estate.

STATEMENT OF THE CASE

Respondent's husband, Raymond R. Tripp, who was petitioner's father, died in Tryon, North Carolina, on April 9, 1959. Decedent left a will, (R. 10) stating that he was of Cuyahoga County, State of Ohio, "temporarily residing in Spartanburg County, State of South Carolina." The will named respondent as sole beneficiary of the estate and nominated her as executrix.

Respondent offered the will for probate in the Probate Court for Cuyahoga County, Ohio, the place designated by decedent's will as his domicile. On May 14, 1959, the Ohio Probate Court allowed the will to probate and entered its probate order in the Court journal. (R. 15 and 16.) By Section 2101.12 of the Ohio Revised Code, the will was required to be recorded in the Court's record of wills with a certificate of the probate thereof, and an alphabetical index of all record entries is maintained in such Court. In addition to constructive notice given by Court records,

petitioner had actual knowledge of the probate prior to expiration of the contest period. (R. 21.) Notwithstanding, petitioner elected not to contest the will in Ohio within the six months period allowed by Section 2741.09 of the Revised Code of Ohio, and such probate became final. *Peters v. Moore* (Ohio, 1950), 154 Ohio St. 177, 93 N. E. (2nd) 683.

After the will had attained immunity from attack in Ohio, and after respondent refused petitioner's request to offer an exemplified copy of the will to probate in Spartanburg County, South Carolina, the petitioner obtained common form probate of the will in the Probate Court for Spartanburg County upon exemplification thereof with the attached certificate of the Ohio Probate Court as to probate in that State. Petitioner conceived that Section 19-286 of the South Carolina Code of Laws (1952), which permitted probate of foreign wills in South Carolina upon exemplification, also gave him the right to contest the will in the South Carolina Courts, and to that end respondent was cited by the Probate Court for Spartanburg County to prove the will in "solemn form" (the first phase of a will contest according to South Carolina procedure). Appearing specially before the South Carolina Probate Court, respondent contended that the South Carolina Court was without jurisdiction to entertain a will contest since the foreign Ohio probate was conclusive under Section 19-286 of the South Carolina Code. After receiving evidence as to decedent's domicile, the Probate Court for Spartanburg County assumed jurisdiction for the purpose of granting ancillary administration, as to South Carolina assets, but construed the South Carolina statute governing probate of foreign wills as denying a will contest in South Carolina Courts whenever the foreign probate decree had attained immunity from attack in the jurisdiction wherein it was

issued. By implication, at least, the Spartanburg County Probate Court found, on the basis of the evidence received, that Ohio was decedent's domicile, as it was so stated in his will. On intermediate appeal to the Common Pleas Court of Spartanburg County, and final appeal to the South Carolina Supreme Court, the factual finding of the Probate Court as to domicile, and its interpretation of the applicable South Carolina statute, have met with concurrence.

Throughout the litigation, and notwithstanding the South Carolina Statute requiring recognition of and conclusive effect to foreign probate of wills, petitioner has repeatedly, but unsuccessfully, contended that the Ohio decree of probate should not, or could not, be recognized by South Carolina Courts since Ohio law did not require, nor did petitioner receive, any written notice of the pendency of the Ohio probate proceeding; which absence of notice, it is argued, results in a denial of due process of law and renders the Ohio probate decree a nullity under the Fourteenth Amendment of the United States Constitution. This is petitioner's claim to substantiality of a federal question on which he now seeks review of the decision of the South Carolina Supreme Court.

ARGUMENT

1. A proceeding to probate a will being one "in rem", the Ohio Probate Code, which does not require notice to decedent's nonresident heirs, does not deprive those expectant heirs of property rights without due process of law.

Historically, and by their very nature, there is no other legal proceeding comparable to a probate proceeding. Of necessity, initial probate is an *in rem* proceeding, for it cannot be ascertained in advance who might be interested against the will and no personal judgment is sought against anyone. The written instrument is the "*res.*" The Probate

Court is concerned only with the simple question, whether the paper offered in the last will and testament of the deceased, and cannot extend its jurisdiction further in an effort to ascertain and enforce rights in property. The Probate Court, in the probate proceeding, confines itself to the establishment, preservation and perpetuation of an important muniment of title. *Tyson v. Scott*, 116 Va. 243, 81 S. E. 57. It is no sense an *"in personam"* proceeding, but strictly *"in rem,"* seeking no judgment against anyone, and is not subject to due process requirements relative to notice.

Nor did the probate decree deprive petitioner of any rights. Contrary to petitioner's contention that he has a "right to inherit", it is universally recognized that he had no such right. The most he had was an expectancy, or hope of succession, either by will or intestacy. Only by sufference of the States of Ohio and South Carolina could he have even an expectant interest. *Irving Trust Company v. Day*, 62 S. Ct. 398, 314 U. S. 556, 862 ed. 452, 137 A. L. R. 1093.

And since a will is a mere piece of paper conferring no right or title until infused with the blood of probate, petitioner's rights to succession were not determinable until the Ohio Probate Court issued its probate decree, and only after then did rights capable of being contested arise. *Pettit v. Morton*, 28 App. 227, 162 N. E. 627; *Ellis v. Davis*, 109 U. S. 485, 3 S. Ct. 327, 27 L. Ed. 1006. Until probated, according to the law of Ohio, the will had no legal standing as a basis for a suit in any court. Ohio Probate Code, Section 2107.61. Even while respondent's application for probate in Ohio was pending, only the hopes and expectations of petitioner were in suspense, for he had no rights to be deprived of. The dead hand could rule succession, and did.

The constitution requires due process with respect to rights, not expectancies which do not ripen into rights. And when a disappointed heir is given the statutory privilege to timely contest the validity of a duly probated and recorded testamentary instrument, which may have frustrated his hopes and expectations, he is in no position to complain of denial of due process simply because he received no notice that the initial probate proceeding was pending and there would be a hearing thereon. Indeed, in Ohio, as in most states, the preliminary probate is a non-adversary proceeding which results in probate upon the proponent making a *prima facie* case, even though there may be conflicting evidence. *In re Will of Elvin*, 146 OS 448, 66 N. E. (2d) 629.

The records of the Cuyahoga County Probate Court showed the probate of the decedent's will, which was required to be entered in the record of wills and index maintained. Ohio Probate Code, Sections 2101.12 and 2101.14. The obvious object of the Ohio Statute requiring such comprehensive records in the Probate Court was to furnish notice to purchasers, subsequent encumbrancers and others interested as to the status of decedents' estates. Petitioner, as an obviously interested party, must be charged with constructive notice of these court records which showed that his father died testate. He was free to contest the will within six months, but purposefully and deliberately refused to take such action.

Only by statute may rights to succession, either by will or intestacy, accrue. State legislatures are free of any federal constitutional prohibitions in fixing the terms and conditions under which a will may be made, and may limit or even abolish the power of testamentary disposition of property within its dominion. *Irving Trust Company v. Day, infra.* A state may annex to the grant to make a will

any condition which it conceives to be to its best interest. *United States v. Perkins*, 16 S. Ct. 1073, 163 U. S. 625, 41 L. Ed. 287, and to that end, may exclusively control the method and manner under which a will may be given effect by probate or rendered ineffectual by contest. The State legislature is free to give directions to courts of probate as to when a will shall be allowed or disallowed as a testamentary document. According to the policy adpoted by the State, the initial probate proceeding may or may not be of an adversary nature, and as a prerequisite to probate jurisdiction, it may be necessary for the proponent of the will, or the court, to first give written notice to some or all of the known interested parties, either by mail[1] or publication,[2] or a combination of the two.[3] In many states, no written notice is required,[4] or it may be discretionary with the court.[5] And even where publication and written notice of the probate application is required, it is purely jurisdictional and the statutory requirements thereabout do not rob the probate proceeding of its "*in rem*" character.

Legislatures, in allowing and regulating testamentary dispositions, and by prescribing probate procedures, have established a method by which title to property shall pass. The testamentary instrument is preserved as a muniment of title and serves as a basis for ownership. For generations, State governments have regarded probate law as within its peculiar province and legislative bodies have dealt with the subject on that premise. There is no suggestion that the numerous and various methods for the

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[1] By mail: Nevada, Rhode Island, Utah, Wisconsin and Wyoming.

[2] Publication: Arkansas and Nebraska.

[3] Combination: California, Michigan, Missouri, North Dakota and South Dakota.

[4] No Notice: Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia and West Virginia.

[5] Discretionary Notice: Connecticut, Maryland, New Hampshire.

preliminary probate of wills have been devised with the idea that the Federal Constitution is applicable, as the primary legislative aim at that point is to insure that the instrument propounded is the will of the decedent and that it meets the particular statutory tests as to execution and attestation to qualify for probate; according to the thinking of many legislatures, this objective may be accomplished in an *ex parte* proceeding.

If this Court should now declare that the "due process" clause applies to initial probate proceedings, and applies the Federal Constitution so as to invalidate probate decrees obtained without prior written notice to interested persons, many titles founded on testamentary instruments will collapse all over the nation, and interminable litigation will arise in many of the United States. Real estate titles assumed to have passed under certain wills would probably not be marketable. This Court cannot ignore the fact that the integrity and stability of ownership and land titles is at stake in many States which have minimal or no notice requirements prior to probate.

Duly probated wills which have been admitted to record can only be challenged according to the prescribed statutory procedure, and practically every state limits the time in which a contest may be commenced. The policy of most states favors an early settling of estates, and this is done through statute imposing a limitation on actions. Petitioner apparently does not quarrel with the Ohio statute which requires a contest to be commenced within six months after admission to probate, but attacks the preliminary Ohio probate as constitutionally void *ab initio* and of no effect.

2. South Carolina was free to recognize the Ohio probate decree and accord it conclusive effect.

South Carolina does not recognize and give effect to a foreign probated will under compulsion; but by legislative choice. Section 19-286, South Carolina Code of Laws, 1952. The Federal Constitution contains no mandate that states shall allow probate to foreign wills. Again, this is a matter to be decided by the state legislature in exercising power over testamentary disposition of property. The magnitude of this power has been previously discussed.

If, in the interest of comity, a state accords conclusive effect to a probate decree which has attained immunity from attack in the foreign jurisdiction, it has gratuitously acted within the spirit of the Full Faith and Credit Clause. This is certainly unlike the case of *Hanson v. Denckla*, 78 S. Ct. 1228, 357 U. S. 235, 2 L. Ed. (2d) 1283, where the decisions of the Delaware and Florida Courts were in conflict and resulted in a dispute over which state could control the disposition of assets. Here, both states agree that there shall be a testamentary disposition of assets, under the provisions of same will, and no problem is presented with respect to construction and operation of the instrument.

Petitioner is trying to bring about conflicting dispositions of the estate, that is, testate in Ohio and intestate in South Carolina.

3. In view of Ohio Statute permitting contest of the Probate Court's jurisdiction upon a will being presented for probate, a party interested against the will is not denied due process of law by having to admit the original probate jurisdiction on contesting the validity of the will in the higher trial court.

Though the above question has not been passed upon by the South Carolina Supreme Court, or the issue clearly

raised, petitioner now asks this Court to review the case on this ground. According to long established rule, no review may be had on matters not raised or passed upon below.

Petitioner contends he has no forum in Ohio to contest the validity of the will without admitting the original jurisdiction of the Probate Court. But the provisions of Section 2107.12 of the Ohio Probate Code refute his contention, for it is there provided that a person interested may contest the jurisdiction of the Probate Court when a will is presented for probate, and the Probate Court shall, after notifying various parties, conduct a hearing and make a decision. The decision of the Probate Court as to jurisdiction is reviewable.

With this statutory procedure, it is difficult to conceive how petitioner has been compelled to forego his privilege to raise any type of jurisdictional question in Ohio, or to raise the issue of decedent's domicile. He could have contested jurisdiction under the Ohio Statute, and if that resulted in an adverse decision, he could have thereafter contested the validity of the will. The six months limitation on bringing the contest would not commence to run until after the jurisdictional question was resolved.

4. Petitioner having had full knowledge of the probate proceedings, he has no standing to challenge the constitutionality of Ohio's probate procedure with respect to written notice.

Petitioner's rights have in no way been impaired by operation of the Ohio Statute under attack. Having possessed actual knowledge of the Ohio proceedings prior to the expiration of the contest period, failure to receive written notice was of no consequence. Petitioner only has standing to protect his own interests. There is no suggestion that there are other non-resident heirs who received

no notice, but even if there were, he has no right to litigate in their behalf and thereby bring before the Court a non-reviewable hypothetical question.

The case of *Tyler v. Judges of the Court of Registration* (1900), 21 S. Ct. 206, 179 U. S. 405, 45 L. Ed. 252, is remarkably similar. There, petitioner challenged certain provisions of the Massachusetts Torrens Law which, in a registration proceeding, required only conspicuous posting of notice as to residents and known persons, and publication as to unknown parties. Petitioner, who owned land adjoining that sought to be registered, disputed the boundary and complained that the rights of parties may be foreclosed without actual notice to them, and without actual knowledge of the proceedings. In refusing petitioner's contention, the Court stated:

> "His objections throughout assume that he has actual knowledge of the proceedings, and may make himself a party to them and litigate the only question, namely, of boundaries, before the Court of Registration. In other words, he is not affected by the provisions of the Act of which he complains, since he has the requisite notice. Other persons, whether residents or non-residents, whose rights might be injuriously affected by the decision, might lawfully complain of the unconstitutionality of an act which would deprive them of notice; but it is difficult to see how the petitioner would be affected by it. Indeed, if the act was subsequently declared to be unconstitutional, the proceedings against him would go for naught. He would have lost nothing since the action of the Court would simply be void, and his interest in the land would remain unaffected by its action."

CONCLUSION

Petitioner fails to present any substantial Federal question to warrant review of this case. The State of South Carolina, in the exercise of its plenary power to permit

and control testamentary dispositions, has allowed the foreign will to probate upon exemplification, and accorded the Ohio probate decree conclusive effect.

The South Carolina Supreme Court has ruled, in accordance with established principles of law, that petitioner has no standing to attack the constitutionality of the Ohio statute in question; and even if he did, that an *in rem* proceeding to probate a will is not subject to due process requirements so as to entitle petitioner to written notice of the probate application.

Petitioner also had constructive notice that his father died testate through the records of the Ohio Probate Court. No rights capable of contest arose until decedent's will was allowed to probate, and indeed, petitioner never had a "right to inherit" subject to deprivation, but only an expectancy.

In conjunction with the power of a State legislature to allow, limit or abolish testamentary dispositions, it also possesses the power to establish probate procedures to satisfy the broad policies of the state in regard to testate succession to property. The Federal Constitution does not interfere with these state policies, and if the legislature conceives that an *ex parte* proceding affords sufficient basis for its courts to determine the validity of a will which it alone allows, it may constitutionally pass such a statute. To now declare the Due Process Clause of the Federal Constitution applicable to preliminary probate proceedings would greatly disturb the stability of property ownership and titles to real estate. No substantial federal question is presented for review by this Honorable Court.

Respectfully submitted,

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